

Tengku Iskandar bin Tengku Ahmad v Sime Bank Bhd

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HIGH COURT (KOTA BAHRU) — BANKRUPTCY NO 29-993 OF 1998
SURIYADI J
27 AUGUST 2001

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Bankruptcy — Notice — Leave to issue — Bankruptcy proceedings commenced more than six years after obtaining judgment — Whether leave required — Whether bankruptcy action a form of execution — Whether requirement for leave under O 46 r 2(1) Rules of the High Court 1980 applicable — Calculation of the six years limitation period — Effect of bankruptcy on calculation of limitation period

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The judgment creditor ('JC') had entered judgment in default ('JID') against the judgment debtor ('JD') sometime on 10 December 1988. It had left the judgment to stand for nearly ten years before commencing bankruptcy proceedings against the latter on 8 November 1998. Upon receiving the bankruptcy notice ('BN') and the creditor's petition ('CP'), the JD, through his counsel, filed a summons in chambers in court (encl 13) to set them aside. The JD alleged that the BN was null and void, as the JC had failed to obtain leave from the court before issuing it, on the pretext that the judgment was obtained more than six years ago. The consequential effect was that the CP was also flawed and hence incompetent. The senior assistant registrar who had heard the summons in chambers application eventually decided for the JD. Being dissatisfied with the decision, the JC had lodged an appeal to the judge in chambers. At the appeal stage, counsel for the JD raised the same argument and relied on O 46 r 2(1) of the Rules of the High Court 1980 ('the RHC'). The JD alleged that the BN was founded on an out of time judgment and the above provision applied, ie leave was required. The JC argued that O 46 r 2(1) of the RHC was inapplicable as the bankruptcy notice was not a form of execution which fell within the context of writ of execution in O 46 r 1 of the RHC and that the limitation period to enforce the JID had stopped running the moment the JD was adjudged to be a bankrupt. It must be noted that in an unrelated case, a receiving and adjudication order was successfully obtained by another judgment creditor against the JD and the JD remained a bankrupt until 16 March 1998. The JC stated that the limitation period began to run on 16 March 1998.

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Held, dismissing the bankruptcy notice and the creditor's petition with costs:

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- (1) Bankruptcy actions do come within the ambit of O 46 r 2(1)(a) of the RHC. Parliament had clearly seen it fit to deliberately advert to the term 'include' in O 46 r 1 of the RHC so as to include bankruptcy actions. Apart from that, the court failed to identify any term, provision or cogent reason that explicitly or implicitly excludes bankruptcy proceedings from being covered by this

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- A** provision, subject to all the conditions being met. Therefore if more than six years have elapsed since the date of final judgment or order, any act to issue a writ of execution must require the court's leave (see p 317E-G).
- B** (2) The six years limitation period, that started to run on 10 December 1988 the day the judgment was granted, would still fall on 10 December 1994. This was due to the inescapable fact that once the annulment order of 16 March 1998 was granted, the legal effect was that the debtor would be reinstated to his original position. It is as if he had never been declared a bankrupt all the way back to 27 September 1990, with his right and status left unblemished. With that retrospective effect and with the way clear, the limitation period will revert all the way back to 10 December 1994. That being so leave is a must O 46 r 2(1) of the RHC is too clear for comfort. If there were to be any exception Parliament would not have any hesitation to state so (see p 320A-B).
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- D** (3) Application of leave is imperative, as otherwise the relevant court will be unable to appreciate the reason of the delay in enforcing the final judgment or order. In the current appeal, the petitioner appellant unfortunately had failed to do that. He filed that bankruptcy notice without obtaining first that prerequisite leave.
- E** With that bankruptcy notice being bad the petition likewise must be equally incompetent (see p 320C-D).

[Bahasa Malaysia summary]

- F** Pemiutang penghakiman ('pemiutang tersebut') telah memasuki penghakiman ingkar ('PI') terhadap penghutang penghakiman ('penghutang tersebut') pada 10 Disember 1988. Ia telah membiarkan penghakiman tersebut begitu selama hampir sepuluh tahun sebelum memulakan prosiding kebangkrupan terhadap penghutang tersebut pada 8 November 1998. Sejurus menerima notis kebangkrupan ('NB') dan petisyen pemiutang tersebut ('PM') tersebut, penghutang tersebut, melalui peguam beliau, telah memfailkan satu saman dalam kamar (lampiran 13) untuk mengetepikannya. Penghutang tersebut mengatakan bahawa NB tersebut adalah batal dan tidak sah, kerana pemiutang tersebut telah gagal untuk mendapatkan kebenaran daripada mahkamah sebelum mengeluarkannya, dengan alasan bahawa penghakiman tersebut didapati lebih daripada enam tahun. Kesan yang diakibatkan adalah di mana PM juga cacat dan oleh itu tidak kompeten. Penolong kanan pendaftar yang telah mendengar permohonan saman dalam kamar akhirnya memutuskan bagi pihak penghutang tersebut. Disebabkan rasa tidak puas hati dengan keputusan tersebut, pemiutang tersebut telah membuat rayuan kepada hakim dalam kamar. Di peringkat rayuan, peguam bagi pihak penghutang tersebut telah menimbulkan hujah yang sama dan
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bergantung kepada A 46 k 2(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Penghutang tersebut mengatakan bahawa NB tersebut didapati di luar had masa penghakiman dan peruntukan di atas diterima pakai, iaitu kebenaran diperlukan. Pemiutang tersebut menghujahkan bahawa A 46 k 2(1) KMT tidak diterima pakai kerana notis kebangkrupan bukan satu kaedah pelaksanaan yang jatuh di bawah konteks writ pelaksanaan A 46 k 1 KMT dan bahawa had masa untuk menguatkuasakan PI tersebut telah berhenti pada saat penghutang tersebut dihukum bankrap. Ia perlu diperhatikan bahawa di dalam satu kes yang tidak berkaitan, satu perintah penerimaan dan penghukuman telah berjaya diperolehi oleh pemiutang penghakiman yang lain terhadap penghutang tersebut dan penghutang tersebut kekal seorang bankrap sehingga 16 Mac 1998. Pemiutang tersebut menyatakan bahawa had masa bermula pada 16 Mac 1998.

Diputuskan, menolak notis kebangkrupan tersebut dan petisyen pemiutang tersebut dengan kos:

- (1) Tindakan-tindakan kebangkrupan jatuh di bawah rangkuman A 46 k 2(1)(a) KMT. Parlimen dengan jelas berfikir ia sesuai untuk dengan sengaja merujuk kepada terma 'termasuk' dalam A 46 k 1 KMT bagi memasukkan tindakan-tindakan kebangkrupan. Selain daripada itu, mahkamah gagal untuk mengenalpasti apa-apa terma, peruntukan atau sebab yang meyakinkan yang secara langsung atau tidak langsung mengecualikan prosiding kebangkrupan daripada dirangkumi oleh peruntukan ini, tertakluk kepada semua syarat yang ditemui. Oleh itu jika lebih daripada enam tahun telah luput sejak tarikh penghakiman atau perintah muktamad tersebut, apa-apa tindakan untuk mengeluarkan satu writ pelaksanaan mestilah memerlukan kebenaran mahkamah (lihat ms 317E-G).
- (2) Had masa enam tahun tersebut, yang bermula pada 10 Disember 1988 iaitu hari penghakiman telah diberikan, masih akan jatuh pada 10 Disember 1994. Ini disebabkan fakta yang tidak dapat dielakkan bahawa sebaik sahaja perintah pembatalan 16 Mac 1998 diberikan, kesan di sisi undang-undang adalah bahawa penghutang akan kembali semula kepada kedudukan asal beliau. Ia seperti beliau tidak pernah diisytiharkan bankrap daripada 27 September 1990 lagi, dan hak dan status beliau juga tidak tercemar. Apa lagi dengan kesan retrospektif dan tiada apa-apa lagi halangan, had masa tersebut akan mula beroperasi dari 10 Disember 1994. Jika begitu, kebenaran adalah perlu, A 46 k 2(1) KMT terlalu nyata mengenai ini. Jika terdapat apa-apa pengecualian Parlimen akan mengatakan demikian (lihat ms 320A-B).
- (3) Permohonan untuk kebenaran adalah imperatif, jika tidak mahkamah yang relevan tidak akan dapat mengetahui sebab kelewatan menguatkuasakan penghakiman atau perintah

- A muktamad tersebut. Dalam rayuan sekarang ini, pempetisyen perayu malangnya telah gagal untuk berbuat demikian. Beliau telah memfailkan notis kebangkrapan tanpa mendapatkan terlebih dahulu kebenaran yang disyaratkan. Memandangkan notis kebangkrapan tersebut tidak sah maka petisyen tersebut juga mestilah sama sekali tidak kompeten (lihat ms 320C–D).]
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Notes

For cases on bankruptcy notice generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1699–1816.

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Cases referred to

- Bell & Anor v Gosden* [1950] 1 All ER 266 (refd)
General Rolling Stock Co, Re (1872) LR 7 Ch App 646 (refd)
Haji Ahmad bin Lazim & Ors, Re; ex p Bank Kerjasama Rakyat (M) Bhd [1999] 5 MLJ 478 (refd)
D *Ide, Re* (1886) 17 QBD 755 (refd)
Lim Ah Hee, Re; ex p Perwira Affin Bank Bhd [1997] 4 CLJ 462 (refd)
Maxwell Fleet and Facilities Management Ltd, Re (in administration) [2000] 1 All ER 464 (refd)
Mohamad Fadzimi Yaakub, Re; ex p UMBC [1998] 1 CLJ 783 (refd)
E *More v More* [1962] 1 All ER 125 (refd)
Sobri bin Arshad v Associated Tractors Sdn Bhd [1991] 3 MLJ 32 (refd)
Woodall, Re (1884) 13 QBD 479 (refd)

Legislation referred to

- F Bankruptcy Act 1967 ss 3(1)(i), 8(1), 93(4), 131
 Bankruptcy Rules r 92(a)
 Rules of High Court 1980 O 46 r 2(1)(a)

Salman Hj Mohd Ideris (Salman M Idris & Co) for the judgment debtor.
Haslina Hassan (Zaid Ibrahim & Co) for the judgment creditor.

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Suriyadi J: The judgment creditor ('JC') had entered judgment in default ('JID') against the judgment debtor ('JD') sometime on 10 December 1988. It, however, had left the judgment to stand for nearly ten years, before commencing bankruptcy proceedings against the latter on 8 November 1998. Upon receiving the bankruptcy notice ('BN') and the creditor's petition ('CP'), the JD, through his counsel, had filed a summons in chambers in court (encl 13) to set them aside. The JD alleged that the BN was null and void, as the JC had failed to obtain leave from the court before issuing it, on the pretext that the judgment was obtained more than six years ago. The consequential effect was that the CP was also flawed and hence incompetent. I shall deal with the latter under a different but appropriate paragraph. The senior assistant registrar who had heard the summons in chambers' application eventually decided for the JD. Being dissatisfied with the decision, the JC lodged an appeal to the judge in chambers.

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At the appeal stage before me, counsel for the JD had raised the same argument and had relied on O 46 r 2(1)(a) of the Rules of High Court 1980 ('the RHC'), which reads:

- (1) A writ of execution to enforce a judgment or order may not issue without leave of the court in the following cases, that is to say:
 - (a) where six years or more have lapsed since the date of the judgment or order ...

On the above argument, the JD alleged that as the bankruptcy notice was founded on an out of time judgment, the above provision thus applied, in that leave was required. In support of the allegation, the counsel had relied on several authorities, inter alia, *Re Haji Ahmad bin Lazim & Ors; ex p Bank Kerjasama Rakyat (M) Bhd* [1999] 5 MLJ 478, with particular reference to holding (3), which reads:

... if more than six years have elapsed since a judgment is obtained, and leave has not been obtained to execute the judgment, the judgment creditor cannot be described as being in a position to issue execution on that judgment. If execution can be issued only with leave of the court, such leave must be obtained before a bankruptcy notice can be issued thereon

Apart from arguing that O 46 r 2(1)(a) of the RHC was inapplicable, the JC also ventilated a secondary argument that the limitation period to enforce the JID had stopped running the moment the JD was adjudged a bankrupt. To appreciate the JC's point of view, it is necessary for me to lay bare some brief facts first. The latter had entered the above mentioned JID against the JD on 10 December 1988. On 27 September 1990, in an unrelated case, a receiving and adjudication order was successfully obtained by another creditor, ie one Yew Chin Eng @ Yew Chee Ying, against the same JD. The latter remained a bankrupt until that RO and AO against him was annulled on 16 March 1998. According to the JC, the limitation period began to run again the day the JD ceased to be a bankrupt ie, on 16 March 1998.

A highly pertinent argument, intricately intertwined with the abovementioned O 46 r 2(1) of the RHC also put forth by the JC was that the bankruptcy proceeding was not a form of execution, which fell within the context of writ of execution of that provision. Grounded on this belief, the absence of leave as prescribed by O 46 r 2 of the RHC thus was no cause for alarm.

The Bankruptcy Act 1967 ('the Act') and Rules, and even the RHC regretfully are not clear on the matter of whether a bankruptcy proceeding comes within the purview of writ of execution or not. Even case law are hard pressed to come across with a resounding view on this issue, except for cases in the like of *Re Lim Ah Hee; ex p Perwira Affin Bank Bhd* [1997] 4 CLJ 462. In this case, when interpreting O 46 r 2(1) of the RHC, Haidar J (as his Lordship then was) had concluded, as per holdings (1) and (2):

- (i) Bankruptcy actions do not come within the meaning of writ of execution and there is no need to get leave under O 46 r 2 of the Rules of the High Court.

- A** (ii) A bankruptcy action, like execution proceedings, is the taking of a further step in an existing action rather than the commencement of a new action.

Slightly more cautious in approach, Edgar Joseph Jr J (as his Lordship then was) in *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508, at p 510 para E opined:

- B** I would make the preliminary observation that the issue of bankruptcy notice is not execution to enforce a judgment ... At most, it seems to me that the issue of a bankruptcy notice may be regarded as a species of practical enforcement.

- C** After having considered *Re Ide* (1886) 17 QBD 755 and *Re Woodall* (1884) 13 QBD 479, his Lordship decided thus in line with the view of Haidar J, that a bankruptcy action was not strictly a form of execution. Their views differed on the aspect of leave when Edgar Joseph Jr J opined that leave must be obtained in order to execute a judgment where six years or more had elapsed. At p 510, the judge had stated:

- D** The judgment or order must be one on which the creditor is in the position to issue execution so that if execution cannot be issued at all, no bankruptcy notice can be issued. If the execution can be issued only with leave of the court, the creditor must obtain such leave before he can issue a bankruptcy notice.

- E** To wind up the sub-issue, and risking reiteration, after having considered the matter from every relevant aspect, I have no compunction in concluding that bankruptcy actions came within the ambit of O 46 r 2(1)(a) of the RHC. Parliament has clearly seen it fit to deliberately advert to the term 'include', and subject to the canon of construction, it is trite that this word, in its ordinary meaning, is not exhaustive. It is diametrically opposed to words like 'means' which permits a hard and fast definition. Needless to say, the terminology 'include' is generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute (*Interpretation of Statutes by Bindra's*). Apart from that, I failed to identify any term, provision or cogent reason that explicitly or implicitly excludes bankruptcy proceedings from being covered by this provision, subject to all the conditions being met.

- G** With the above mentioned O 46 r 2(1)(a) of the RHC at the back of my mind, I would not hesitate to conclude that if more than six years have elapsed since the date of final judgment or order, any act to issue a writ of execution must require court's leave. No doubt if that judgment or order were yet to be final or leave was yet to be obtained, then at the stage of issuing the BN, the JC could not be said to be described as being in a position to issue a writ of execution.

- H** Statutorily, what is undeniable is that a bankruptcy notice cannot stand on its own, but can only be issued if a final judgment or final order of a court exists. This is so as under s 3(1)(i) of the Act a debtor commits an act of bankruptcy, inter alia, if a creditor has obtained a final judgment or final order against him. This requirement is restated under r 92(a) of the Bankruptcy Rules ('the Rules') where, when applying for the issuance of a

bankruptcy notice, an applicant creditor is required to produce before the registrar an office copy of the judgment or order on which the notice is founded (*Re Mohamad Fadzimi Yaakub; ex p UMBC* [1998] 1 CLJ 783). Apart from the above statutory requirement, if execution had been stayed in the like of a prior issuance of writ of seizure and sale, a writ of possession and writ of delivery, the creditor would likewise be in the same predicament, thus preventing him from filing that bankruptcy notice (s 3(1)(i) of the Act; *Re Woodall* (1884) 13 QBD 479).

I now move on to discuss the next but connected issue raised by the JC, ie pertaining to the revival of the limitation period, pursuant to the annulment of the unconnected bankruptcy action undertaken by the above mentioned Yew Chia Eng @ Yew Chee Ying.

Section 8(1) of the Act reads:

...no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of any debt, or shall proceed with or commence any action or legal proceeding in respect of such debt unless with the leave of the court ...

No comprehensive dissertation is required to conclude that, by virtue of the above provision, the right of a JC to obtain remedy in respect of any debt against a JD during the bankruptcy term is suspended, unless leave of the court has been obtained beforehand.

The poser that follows in its wake is, what then if a creditor is late in filing his proof of debt, in that it is past the limitation period, after the making of the receiving order? Will leave be denied in that circumstance? To answer this question an analogical exercise will have to be undertaken. In *Re General Rolling Stock Co* (1872) LR 7 Ch App 646 a company was ordered to be wound up in February 1865, with the certificate of debts and claims filed on December 1870; and in January 1871 dividend was paid on the debts which had been established. In March 1871, the holder of bills of exchange payable in February 1865 gave the first notice of his claim and applied for leave to prove it. Unfortunately the Master of the Rolls, on the ground that the statute of limitation barred the debt, rejected the proof. On appeal the court viewed that as the assets were made applicable to the payment of all liabilities of the company subsisting at the date of the winding up order, the statute of limitation therefore did not run against a creditor. In other words, even though the applicant had filed the proof of claim late, but as the limitation factor was discounted due to the winding up order, he was at liberty to still prove his claim on the remaining assets, if any.

Even though the above case is not on all fours with the facts of the current case its importance cannot be denied. What is relevant is that, dependant upon the nature of the matter, courts may conclude whether the matter at hand may or may not be affected by limitation', or a moratorium on the limitation period is in place. In *Re Maxwell Fleet and Facilities Management Ltd (in administration)* [2000] 1 All ER 464, the court had occasion to succinctly state that, as regards winding up cases, the limitation period during that time would be arrested. The reasoning was that, a

- A** winding up case involved a new regime, whereby the available assets would be distributed rateably to those who had enforceable claims.

For purposes of this poser the case of *Bell & Anor v Gosden* [1950] 1 All ER 266 will also be highly enlightening. The facts of this case in a gist were that, a law was passed in England during World War II, whereby no rent in respect of any premises in an evacuation area was recoverable during the evacuation period. Gosden had stayed at the disputed premise for a certain length of period without paying any rentals. Bell, the landlord on 4 November 1948 commenced proceedings for unpaid rents payable outside the statutorily protected period. The tenant in his defence had objected that the action had been filed way passed the limitation period. The Court of Appeal eventually held that as long as the rent was irrecoverable by law, the running of time under the Limitation Act was suspended. Time started to operate again only after that bar had been lifted. The court there had stated at p 13:

- D** That, I think, is a fair analogy, and it reinforces the argument on which my conclusion is based, namely, that the period of limitation set by s 17 is regarded as a period during which the ordinary remedy exists, and, if the right to bring an action and recover is for any reason removed, then the basis on which the running of the time under which the statute operates goes with it.

Having considered the niceties of the effect of an adjudication order, with the rights of the creditor being statutorily curtailed by s 8(1) of the Act, there is no reason why the arguments applicable to winding up matters should not equally apply to bankruptcy matters. This is so as, inter alia, the available properties are vested on the official assignee, to be distributed to those who have enforceable claims. That being so it is my conclusion that during the bankruptcy term, the running of the limitation period must surely be arrested/suspended vis-a-vis the creditor with such claim.

F Notwithstanding the above, for some good reason or other in the event a creditor fails to obtain remedy against a debtor by reason of s 8(1) of the Act, the right to that remedy is however revived as soon as the bankruptcy is lifted. Simultaneously this gives rise to a revival of the previous limitation period (*More v More* [1962] 1 All ER 125). If the final judgment or order has passed the six years period, leave is also required but pursuant to a different law, ie the said O 46 r 2(1)(a) of the RHC.

G So, returning to the facts of this case, will leave be required by the creditor as provided for under O 46 r 2(1)(a) of the RHC? To resolve this matter, an appreciation of the other relevant facts of the case is much needed. The creditor here had entered judgment against the debtor on 10 December 1988, and under normal circumstances, that six year period during which the creditor could enforce the judgment without leave of the court, would expire sometime on 10 December 1994. As rationalized earlier, due to the unrelated bankruptcy order from 27 September 1990 until 16 March 1998, any form of execution on that judgment thereon could only be carried out with leave of the court. Throughout this period, through no fault of it, the creditor was barred by s 8(1) of the Act from issuing any form of execution against the debtor.

After much deliberation, I was of the opinion that the six years limitation period, that started to run on 10 December 1988 the day the judgment was granted, would still fall on 10 December 1994. This was due to the inescapable fact that once the annulment order of 16 March 1998 was granted, the legal effect was that the debtor would be reinstated to his original position. It is as if he had never been declared a bankrupt all the way back to 27 September 1990, with his right and status left unblemished. With that retrospective effect and with the way clear, the limitation period will revert all the way back to 10 December 1994. That being so leave is a must O 46 r 2(1) of the RHC is too clear for comfort. If there were to be any exception Parliament would not have any hesitation to state so.

For the sake of justice based on acceptable grounds, like that of the current facts, no court will reject the creditor's justifiable application for leave and thenceforth permit him his remedy by enforcing the judgment (s 93(4) of the Act read together with O 46 r 2(1)(a) of the RHC. That application of leave is imperative, as otherwise the relevant court will be unable to appreciate the reason of the delay in enforcing the final judgment or order. In the current appeal the petitioner appellant unfortunately had failed to do that. He filed that bankruptcy notice without obtaining first that prerequisite leave. With that bankruptcy notice being bad the petition likewise must be equally incompetent.

Even turning to s 131 of the Act for assistance would not cure that shortcoming here. As a successful bankruptcy proceeding would result in untold repercussions on the aggrieved party, strict compliance of the relevant provisions of the Act and Rules under discussion, is a must. Any non-compliance of the prescribed statutory prerequisites must necessarily favour or benefit the aggrieved party. To wind up this point, in the case of *Sobri bin Arshad v Associated Tractors Sdn Bhd* [1991] 3 MLJ 32, Edgar Joseph Jr J (as his Lordship then was) had occasion to state at p 34:

On a concluding note, bearing in mind that bankruptcy proceedings, if successful, would have harsh and penal consequences, meticulous compliance with the law is often necessary. The case of *Re North, ex p Hasluck* [1895] 2 QB 264 is authority for the proposition that the statute relating to the bankruptcy should be construed in a manner most favourable to the person most affected.

Based on the above reasons, at the end of the day I dismissed the bankruptcy notice and the creditor's petition with costs.

Bankruptcy notice and creditor's petition dismissed with costs.

Reported by Chew Phye Aun